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Opinion on the merits following prior opinion denying motion to dismiss

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HEATHER EDWARDS, Plaintiff and Appellant, v. BROADWATER CASITAS CARE CENTER et al., Defendants and Respondents.	B247596 (Los Angeles County Super. Ct. No. BC442997)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Reversed n part; affirmed in part.

Lyon Law and Geoffrey C. Lyon for Plaintiff and Appellant.

Levinson Arshonsky & Kurtz, Robert A. Levinson and Yoonis J. Han for Defendants and Respondents.

I. INTRODUCTION

Plaintiff, Heather Edwards, appeals from an attorney's fees and costs award to defendant, Broadwater Casitas Care Center, Limited Liability Company, and a codefendant, Nathan Ure. Plaintiff filed a lawsuit against defendants for various violations under the Fair Employment and Housing Act. Defendants moved to compel arbitration, which the trial court ordered. Following arbitration, the arbitrator returned an award in defendants' favor, but did not assess any attorney's fees or costs. Defendants moved to confirm the award. Defendants' confirmation motion was granted. Defendants subsequently moved for an attorney's fees award and costs before the trial court. The attorney's fee and costs award motion was granted. Plaintiff argues the trial court lacked jurisdiction to award attorney's fees and costs stemming from the arbitration. We reverse the order under review. Upon remittitur issuance, the trial court is to calculate defendants' costs and attorney's fees related to the judicial proceedings only. (Code Civ. Proc., § 1033.5, subd. (a)(10); Gov. Code, § 12965, subd. (b).) And the trial court is to resolve any attorney's fee and cost issues because plaintiff has largely prevailed on appeal.

II. BACKGROUND

A. Plaintiff's Complaint

On August 5, 2010, plaintiff filed her complaint. Plaintiff alleges the following. Plaintiff was an employee of defendant from approximately November 2008 to her termination on December 14, 2009. Defendant operated the Casitas Care Center in Granada Hills, California. Mr. Ure was an owner and the director of operations. Plaintiff was an administrator. Plaintiff is African-American and practices the Jewish religion.

On August 11, 2009, a physician, identified in the complaint only as Dr. Devore, saw a problem with plaintiff's baby's heart on the ultrasound. Plaintiff called Mr. Ure when she returned home and told him of the problem. Plaintiff was agitated and requested the day off. On August 26, 2009, Mr. Ure took plaintiff out to lunch. Mr. Ure mentioned that a sister-in-law's son had a heart defect. Mr. Ure asked whether Jewish people can get abortions. Plaintiff responded that she and her husband were not planning to get an abortion.

On September 24, 2009, plaintiff sent Mr. Ure an e-mail reminding him she would be out for doctor's appointments and on Yom Kippur. Mr. Ure arrived at the facility and complained that plaintiff had too many doctor's appointments. He stated plaintiff needed to be in the office more because there was a new director of nurses. Plaintiff assured Mr. Ure she was in the office 8 to 10 hours daily and sometimes on weekends. Plaintiff reminded him she is on call "24/7" and always made up her time at the facility if she was not there during normal hours. Mr. Ure replied, "I'm just concerned because you have a lot of doctor's appointments and it's just going to get worse."

On October 7, 2009, an administrator meeting and quality assurance competition were held. Plaintiff made a presentation, after which an administrator, Andrew Johnson, made a comment that he doubted she would put it into practice. Mr. Johnson stated employees should hold each other accountable and not tolerate people who are always sick or visiting a doctor. He stated some people were always out of their buildings at doctor's appointments and believed that another absent employee was probably faking. Plaintiff explained she was having complications with her pregnancy.

On November 5, 2009, plaintiff was getting ready for a team meeting when Mr. Ure called her regarding a recently terminated employee, Cesar Guerra. Mr. Guerra's office included cabinets and a computer. Plaintiff was told defendant had to give Mr. Guerra the cabinets and computer from his office. Plaintiff responded the cabinets were the company's property and she was in the middle of preparing for the meeting. Mr. Ure yelled at plaintiff to "get over it" and clear everything out. Plaintiff

started to experience cramps from the stress. Plaintiff called a physician identified only as Dr. Gumbs out of concern for the unborn child.

On November 7, 2009, plaintiff informed Mr. Ure she was feeling a lot of back pain and looked forward to resting after a survey. The next day, when the survey ended, plaintiff told Mr. Ure she would take the day off to rest because she was exhausted. While at home resting, Mr. Ure called plaintiff and badgered her about when she was going to the facility. Plaintiff did not go to work the next day because she was still not feeling well.

On November 15, 2009, Mr. Ure and an owner, Kim Peppijohn, came to the facility. Mr. Ure told plaintiff to work on the way she talked because "it might work in the ghetto but it is not the same" there. On December 3, 2009, Mr. Ure came to meet plaintiff. He asked her about the work the roofers did. Plaintiff said another employee identified only as Reuben, supervised it and said "the job" was satisfactory. Mr. Ure responded, "'If Rueben can get up there as big as he is so can you.'"

On December 10, 2009, plaintiff was notified a person only identified as "Angie" had never taken a director of staff development class. Plaintiff forwarded this information to Mr. Ure and Douglas Easton, another owner of defendant. Plaintiff also notified them she had informed the Department of Health. On December 14, 2009, plaintiff officially reported the incident to the Department of Health. On December 14, 2009, plaintiff's employment ended with defendant.

Plaintiff alleged 11 causes of action: pregnancy harassment; gender discrimination; race discrimination; disability discrimination; violation of pregnancy disability leave; religious harassment; religious discrimination; medical leave discrimination; retaliation for opposing Fair Employment and Housing Act violations; retaliation for refusing to participate in conduct which violated statutes; and failure to prevent harassment and discrimination. Plaintiff requested as relief compensatory damages, costs, and reasonable attorneys' fees.

B. Defendants' Motion To Compel Arbitration

On September 3, 2010, defendants moved to compel arbitration. Defendants argued plaintiff signed a binding arbitration agreement when she became a Broadwater Casitas Care Center employee. The arbitration agreement states in pertinent part: "[I]f any complaints and concerns are unable to be informally resolved by us, then any dispute, controversy or claims between us, including without limitation, . . . claims of discrimination or harassment (whether in the hiring process or after employment) and all other common law and statutory claims, including all claims based upon federal or state civil rights laws, including claims under the . . . [Fair Employment and Housing Act] . . . to the extent the law provides Claims may be arbitrated, shall at the request of either the employee or employer be submitted to and settled by binding arbitration. Such arbitration shall be conducted in Los Angeles County, California. Such arbitration shall include any Claims you have against employer or any of its officers, managers, employees, supervisors, agents, affiliated companies or owners. [¶] . . . [¶] This binding arbitration shall be conducted by a retired judge or such other person as jointly selected by the parties, and the procedure governed by the California Arbitration Act. (Cal. C.C.P. § 1280 et seq.) . . . . The arbitration of all issues, including damages (if applicable) shall be final and binding upon the [sic] all parties to the extent permitted by law. Judgment upon the award may be entered by any court having jurisdiction. The parties shall each initially bear their own costs and attorney[']s] fees. The employer shall pay for the arbitrator's fees and any out-of-pocket costs required for the administration of the arbitration (such as room rental charges). The arbitrator shall issue a written decision explaining the reasons for the decision. The arbitrator shall follow the applicable law in determining whether to award attorneys' fees and costs to the prevailing party." Plaintiff and defendants signed the arbitration agreement. Plaintiff did not file an opposition to defendants' motion. On November 10, 2010, defendants' motion to compel arbitration was granted and the proceedings were stayed.

C. The Arbitrator's Award

Binding arbitration took place on April 9 through 12 and May 8, 2012. On July 9, 2012, the arbitrator issued his factual findings, conclusions of law and award. Regarding the alleged ethnic and religious discrimination, the arbitrator found plaintiff was not subjected to comments about her race. Mr. Ure's comment regarding whether Jews could have abortions did not demonstrate racial or religious discrimination. Regarding retaliation for denial of pregnancy disability and medical leave, the arbitrator found plaintiff did receive paid and medical leave. The arbitrator found plaintiff did not demonstrate gender and pregnancy discrimination. Plaintiff did not appear to suffer any adverse employment action, such as termination, demotion or denial of an available job that would suggest discrimination. Plaintiff had resigned on July 18, 2010, and had only one day of leave under the California Family Rights Act.

Regarding pregnancy harassment, the arbitrator found the alleged conduct did not, in its totality, demonstrate unlawful harassment. Plaintiff attended every medical appointment she wanted. Plaintiff suffered no loss of pay, position or benefits and did not show any connection between the alleged conduct and her emotional distress. Regarding retaliation under the Fair Employment and Housing Act, the arbitrator found no evidence of improper retaliatory conduct. Plaintiff argued Mr. Ure retaliated against her and Mr. Easton placed her on paid administrative leave because of her complaints regarding a director's qualifications. The arbitrator determined there was no evidence plaintiff complained that Mr. Ure had denied her the right to attend medical appointments. Mr. Easton's e-mail provided plaintiff a choice to take leave. Again, plaintiff did not lose her title, responsibilities, pay or benefits. The arbitrator found plaintiff's claims of discrimination, harassment and retaliation were unproven and dismissed them with prejudice. The arbitrator did not discuss an award of attorney's fees or costs for any party.

D. The Trial Court's Attorneys' Fees And Costs Award

On July 19, 2012, defendants filed a petition to confirm the arbitration award. On September 14, 2012, plaintiff filed a non-opposition statement to defendants' petition. On September 19, 2012, the trial court granted defendants' petition and entered judgment with costs.

On September 20, 2012, defendants submitted a costs memorandum for $19,826. The costs listed included depositions, service of process, and witness fees. Of the listed costs, $710 was for the motion to compel arbitration and $60 was for the petition for an order confirming the arbitration award.

On November 13, 2012, defendants moved for attorneys' fees after judgment. Defendants requested $147,741.25. Government Code section 12965, subdivision (b) provides in part, "In civil actions brought under this section [the Fair Employment and Housing Act], the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs . . . ." Defendants argued a court may award a prevailing defendant attorney's fees if the plaintiff's claim was found to be frivolous, unreasonable, or groundless. Defendants relied on *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 420-222 and *Cummings v. Benco Buildings Services* (1992) 11 Cal.App.4th 1383, 1387.

On January 3, 2013, plaintiff filed an opposition to defendants' costs and attorney's fees motion. However, the trial court rejected plaintiff's opposition for violation of California Rules of Court concerning spacing, page limits, and an exhibits index. On January 16, 2013, the trial court granted in full defendants' attorney's fees motion. The trial court found plaintiff's causes of action to be frivolous, unreasonable and groundless. The trial court found defendants' requested fees reasonable and awarded $158,471.25.

On February 20, 2013, plaintiff filed a motion to vacate the award of costs and attorney's fees. The trial court denied the motion on March 14, 2013 on procedural grounds. Plaintiff filed her notice of appeal.

III. DISCUSSION

A. Overview

We first examine whether the trial court was permitted to award attorney's fees in this action. Our Supreme Court has held when the arbitrator had the power to decide the recovery of attorney's fees, the arbitrator's decision was final and generally not judicially reviewed for error. (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 776 (*Moshonov*); *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782, 786.) Our Supreme Court held, "In cases involving private arbitration, '[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation], and '"[t]he powers of an arbitrator are limited and circumscribed by the agreement of stipulation or submission."' [Citations.]." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8-9; accord, *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 259; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 ["Private arbitration is a matter of agreement between the parties and is governed by contract law."].) Because there is no extrinsic evidence necessary to interpret the arbitration agreement, we apply a de novo standard of review. (*Khavarian Enterprises, Inc. v. Commline, Inc.* (2013) 216 Cal.App.4th 310, 318; *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263, 273.)

B. The Arbitration Agreement Includes Attorney's Fees And Costs

As noted, the arbitration agreement provides in part: "The arbitration of all issues, including damages (if applicable) shall be final and binding upon . . . all parties to the extent permitted by law. . . . The arbitrator shall follow the applicable law in determining whether to award attorneys' fees and costs to the prevailing party." Here, plaintiff prayed in her complaint for costs and reasonable attorney's fees. The costs and attorney's fees was thus an issue that the arbitrator could properly consider. Additionally, the arbitrator under the arbitration agreement was required to follow applicable law in determining whether to award attorney's fees and costs to the prevailing party. Because the issue of attorney's fees and costs was before the arbitrator, his non-award of attorney's fees and costs is subject to arbitral finality.

Our Supreme Court's reasoning in *Moshonov* is controlling here. In *Moshonov*, the plaintiff sued the defendants for damages arising out of a purchase of residential property. (*Moshonov*, *supra*, 22 Cal.4th at p. 773.) The defendants answered and filed their own cross-complaint. (*Id.* at p. 774.) All parties prayed for reasonable attorney's fees and agreed to send the matter to binding arbitration under the California Rules of Court. (*Ibid*.) The real estate contract provided: "'Should arbitration or suit be brought to enforce the terms of this contract or any obligation herein, including any action by Broker(s) to recover commissions, the prevailing party shall be entitled to reasonable attorney's fees.'" (*Ibid*.) After hearing and briefing, the arbitrator ruled for defendants. (*Ibid*.) The arbitration award provided the defendants were entitled to recover costs, but made no specific provision for attorney's fees. (*Ibid*.) The defendants moved in superior court to confirm the award and to award them attorney's fees. (*Ibid*.) The superior court remanded the issue to the arbitrator to make an attorney's fees finding. (*Ibid*.) On remand, the arbitrator denied the attorney's fees request. (*Id.* at p. 775.) The defendants then moved in superior court to correct the award under Code of Civil Procedure section

1286.6, subdivision (b). (*Ibid*.) The superior court found the arbitrator had not exceeded her powers in denying the fees. (*Ibid*.)

Our Supreme Court affirmed the judgment. (*Moshonov*, *supra*, 22 Cal.4th at p. 773.) Our Supreme Court first noted: "In *Moncharsh*, this court held judicial review of private, binding arbitration awards is generally limited to the statutory grounds for vacating (§ 1286.2) or correcting (§ 1286.6) an award; we rejected the view that a court may vacate or correct the award because of the arbitrator's legal or factual error, even an error appearing on the face of the award. (*Moncharsh*, *supra*, 3 Cal.4th at pp. 8–28.) We further explained that arbitrators do not 'exceed[] their powers' within the meaning of section 1286.2, subdivision (d) and section 1286.6, subdivision (b) merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators. 'The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.' (*Moncharsh*, *supra*, at p. 28.)" (*Id.* at pp. 775-776; see *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 685.)

Our Supreme Court further found: "We agree with the courts below that, under the principle of arbitral finality as explained in *Moncharsh*, the arbitrator's award in the present case could not be judicially corrected to award defendants their attorney fees. As discussed above, all parties had prayed for fees in their various pleadings. The parties then submitted 'this matter' to binding arbitration, without any pertinent limitation on the issues to be arbitrated. Under the agreed rules of arbitration, the California Rules of Court ordinarily governing judicial arbitration, the arbitrator was empowered 'to decide the law and facts of the case and make an award accordingly.' (Cal. Rules of Court, rule 1614(a)(7).) The award was to 'determine all issues properly raised by the pleadings, including a determination of any damages and an award of costs if appropriate.' (*Id.*, rule 1615(a).) The arbitrator was expressly empowered 'to award costs, not to exceed the statutory costs of the suit.' (*Id.*, rule 1614(a)(8); see [Code Civ. Proc.,] § 1033.5, subd. (a)(10)(A) [attorney fees allowable as costs when authorized by contract].) Under these

circumstances, the arbitrator had the power to decide the entire matter of recovery of attorney fees. The recovery or nonrecovery of fees being one of the 'contested issues of law and fact submitted to the arbitrator for decision' (*Moncharsh, supra*, 3 Cal.4th at p. 28), the arbitrator's decision was final and could not be judicially reviewed for error." (*Moshonov, supra*, 22 Cal.4th at p. 776, fn. omitted; see *Mave Enterprises, Inc. v. Travelers Indemnity Co.* (2013) 219 Cal.App.4th 1408, 1432.)

Our colleagues in Division Two of this appellate district and the Fourth Appellate District, Division One, have issued decisions which emphasize the arbitrator's role in fixing arbitration related fees and costs. (*Maaso v. Signer* (2012) 203 Cal.App.4th 362, 377; *Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 706.) *Maaso v. Signer, supra,* involved a medical malpractice complaint. (203 Cal.App.4th at p. 366.) Our Division Two colleagues held: "[T]he parties stipulated that 'the claims and controversies alleged in this action' were submitted to 'binding, contractual arbitration.' The medical malpractice complaint sought 'damages according to proof, costs and all proper relief.' Because the submission [to the arbitrator] was not limited, it included the issue of costs and interest and, where available, attorney fees. [See *Corona v. Amherst Partners, supra,* 107 Cal.App.4th at p. 706.]." (*Maaso v. Signer, supra,* 203 Cal.App.4th at p. 377.) *Corona* involved a real estate purchase. Our Fourth District colleagues held, "The trial court correctly concluded from the record before it that, because the parties' stipulation did not limit the issues to be resolved through arbitration, the issue of Corona's [the plaintiff's] entitlement to attorney fees and costs, as requested in his complaint, was subject to determination in arbitration proceedings." (*Corona v. Amherst Partners, supra,* 107 Cal.App.4th at p. 706.)

The arbitration agreement here contained language which likewise placed the issue of costs and attorney's fees before the arbitrator. The arbitration agreement encompassed, "any dispute, controversy or claims" arising from wrongful termination and discrimination claims. The arbitration agreement provides, "The arbitration of all issues, including damages (if applicable) shall be final and binding upon . . . all parties to

the extent permitted by law." Additionally, the arbitration agreement requires, "The arbitrator shall follow the applicable law in determining whether to award attorneys' fees and costs to the prevailing party." The Fair Employment and Housing Act has a specific provision governing the award of attorney's fees. (Gov. Code, § 12965, subd. (b).) Thus, an attorney's fees award under the Fair Employment and Housing Act was properly before the arbitrator. Based on the arbitration agreement language, the arbitrator had the authority to decide the entire attorney's fees matter and the arbitration proceedings costs.

The arbitrator's silence on the issue is an implied finding that no attorney's fees or costs were to be awarded to defendants. (*Griffith Co. v. San Diego College for Women* (1955) 45 Cal.2d 501, 516 [all matters submitted to arbitration were ruled upon by the arbitrators]; see *Sapp v. Barenfeld* (1949) 34 Cal.2d 515, 523 [holding arbitrator's omission to find certain items submitted before him is in effect a disallowance thereof, even if such admission is due to arbitrator's mistake].) Defendants did not move to modify the award under Code of Civil Procedure section 1286.6. Thus, the rule of arbitral finality applies. The trial court lacked authority to impose costs and attorney's fees incurred during the arbitration proceedings.

C. The Arbitrator Did Not Find Plaintiff's Claims Frivolous, Unreasonable Or Groundless And The Trial Court Lacked Authority To Make Such A Finding

The trial court did not have authority to make a separate finding of law regarding the merits of plaintiff's claims. As noted, the trial court found plaintiff's claims to be frivolous, unreasonable, or groundless when it awarded defendant's attorney's fees. (See *Christiansburg Garment Co. v. EEOC*, *supra*, 434 U.S. at pp. 413-414.) However, our Colleagues in Division Six of this appellate district have held: "Review of arbitration awards is restricted. Only a limited form of judicial review is provided by statute. The arbitrator's findings on questions of both law and fact are conclusive." (*Severtson v. Williams Construction Co.* (1985) 173 Cal.App.3d 86, 92-93 citing, *Jones v. Kvistad*

(1971) 19 Cal. App. 3d 836, 840; *Lehto v. Underground Construction Co.* (1977) 69 Cal.App.3d 933, 939.) As stated previously, the arbitrator was presented with the issue of whether to award attorney's fees. His omission of an attorney's fees award was an implied finding that defendants were not entitled to such relief. The only means of awarding an attorney's fees award to prevailing defendants in a Fair Employment and Housing Act claim is to find plaintiff's claims were frivolous, unreasonable or groundless. Thus, the arbitrator made an implied finding that plaintiff's complaint was not frivolous, unreasonable or groundless. The trial court did not have the authority to set aside the arbitrator's implied finding in this regard. Because we find the trial court had no authority to award defendant attorney's fees and the costs incurred in the arbitration, we need not address the parties' further arguments.

IV. DISPOSITION

The judgment is reversed. Upon remittitur issuance, the trial court is to award defendants' costs incurred in judicial proceedings to enforce the arbitration agreement and award only. Plaintiff, Heather Edwards, is awarded her appeal costs from defendants, Broadwater Casitas Care Center, Limited Liability Company and Nathan Ure. Any issue concerning attorney's fees on appeal is to be litigated pursuant to California Rules of Court, rules 3.1702(c) and 8.278(c) et seq.

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TURNER, P. J.

I concur:

KRIEGLER, J.

MOSK, J., Concurring

I concur with the understanding that costs to be awarded defendants incurred in judicial proceedings to enforce the arbitration agreement and award include attorney fees.

MOSK, J.